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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON LEE FENSTERMACHER,

Defendant and Appellant.

G041760

(Super. Ct. No. 08HF1312)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
W. Michael Hayes, Judge. Affirmed.

Stephen S. Buckley, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Scott C. Taylor and
William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted Jason Lee Fenstermacher of one count of assault as a hate crime (Pen. Code, §§ 240, 422.7, subd. (a)), with a true finding on a gang enhancement (*id.*, § 186.22, subd. (b)), and one count of street terrorism (*id.*, § 186.22, subd. (a)). (All further statutory references are to the Penal Code).¹ The trial court sentenced Fenstermacher to consecutive prison terms of two years for assault as a hate crime, three years for the gang enhancement, eight months for street terrorism, and one year each for two prison term prior convictions, for an aggregate sentence of seven years eight months.

Fenstermacher argues the evidence was insufficient to support the conviction for street terrorism and the true finding on the gang enhancement. We disagree and affirm.

FACTS

We view the evidence in the light most favorable to the verdict and resolve all conflicts in its favor. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

Fenstermacher was an active participant in Public Enemy Number 1, a white supremacist gang, also known as PEN1. PEN1 operates within the white supremacist gang hierarchy dominated by the Aryan Brotherhood and as such does its bidding.

Around 11:00 a.m. on July 12, 2008, Veronica Weber drove her boyfriend Keith Hunter and Fenstermacher in her Mazda Miata to a bar. Fenstermacher and Hunter, also a PEN1 member, drank Tokyo tea and talked about “race bashing”—finding someone of a different race and beating him or her up. Weber then drove Fenstermacher

¹ We specifically refer to Penal Code section 186.22, subdivision (a) as section 186.22(a) and section 186.22, subdivision (b) as section 186.22(b). The use of parentheses surrounding the letter “a” or “b” already establishes the reference to a subdivision, hence the addition of the word “subdivision” or the abbreviation “subd.” is superfluous.

and Hunter to another bar, where they played pool and drank beer. As Fenstermacher and Hunter drank about a pitcher of beer each, they became increasingly agitated and talked more about race bashing.

Weber, Fenstermacher, and Hunter left the bar in the Miata. Weber drove, and Fenstermacher and Hunter were tucked snugly into the single passenger seat. While listening to white supremacist music with the volume turned up, Fenstermacher and Hunter became excited and stuck their arms out of the open passenger side window to make Nazi salutes.

About 1:30 p.m. on July 12, 2008, Edgar Alberto Sanchez Galindo (Sanchez) was driving along Bristol Street on his way to work. He had the window down and was listening to hip-hop music. As he was stopped at the intersection of Bristol and Redhill Streets, the Miata driven by Weber pulled up alongside on his left. Fenstermacher and Hunter screamed at Sanchez, “your race is a bunch of pussies” and “white pride,” challenged him to a fight, and made Nazi salutes while shouting “Hail Hitler.” Though angry, Sanchez responded by rolling up his window and driving quickly through the intersection as soon as the light changed.

When Sanchez stopped at the intersection of Bristol Street and Jamboree Road, he did not see Weber’s car and rolled down his window. Weber had continued driving along Bristol and, at the Jamboree intersection, stopped in the lane next to Sanchez, behind a vehicle driven by Richard Hart. Fenstermacher and Hunter jumped out of the Miata and approached Sanchez. Hunter punched Sanchez in the face through the open window and yelled, “what the [expletive] is your problem.” Hunter and Fenstermacher ran back to the Miata, jumped into it, and, according to Hart, laughed with Weber “as if it was a sport.”

Both Sanchez and Hart called the police and, when the traffic light turned green, followed the Miata. Hart managed to get the Miata’s license plate number before losing track of the car. Sanchez followed the Miata until it came to a stop, but drove

away when Fenstermacher and Hunter got out of the Miata and ran menacingly toward Sanchez's car.

Orange County Sheriff's Deputy James Karr, a member of the gang enforcement team, testified as an expert on gangs in general and the white supremacist gang PEN1 in particular. PEN1 began in the 1980's in Long Beach and Huntington Beach as a group of white men who liked punk rock music, and evolved into the "right-hand man" of the Aryan Brotherhood, the "supreme white prison gang." As of July 2008, PEN1 had about 120 active members in Orange County and 200 or more total active members. Its primary activities are murder, attempted murder, assault with a deadly weapon, narcotics sales, and vehicle theft. In 2003 and 2004, two PEN1 members suffered gang-related murder and attempted murder convictions in Orange County. PEN1 was not territorial, had no claimed "boundaries," and at the time of trial did not have a documented rival gang.

Karr previously had conducted a field interview of Fenstermacher, in which he admitted participating in PEN1. In addition, Karr observed the tattoos on Fenstermacher's body, searched his residence, viewed a Web site displaying his connection to PEN1, and reviewed jail records connecting him with PEN1. In Karr's opinion, Fenstermacher was an active member of PEN1 as of July 12, 2008. Karr also had investigated Hunter and determined he too was an active participant of PEN1 as of July 12, 2008.

After being presented with a hypothetical set of facts mirroring those of this case, Karr opined the offense was committed for the benefit of or in association with a criminal street gang. He testified the crime promoted the gang's criminal conduct by gaining notoriety for the gang and creating respect for the gang through fear, and commission of the crime showed active participation in the gang.

DISCUSSION

I. *Street Terrorism Count (§ 186.22(a))*

The jury convicted Fenstermacher of one count of street terrorism under section 186.22(a), which provides, in relevant part: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished”

“The substantive offense defined in section 186.22(a) has three elements. Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, is the first element The second element is ‘knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity,’ and the third element is that the person ‘willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.’” (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

Fenstermacher argues the evidence did not support an inference his assault on Sanchez was a gang activity and therefore was insufficient to support the third element. He argues his actions, though racially motivated, were not gang related and were not committed with the specific intent to promote or further PEN1’s criminal activities.²

By its plain language, section 186.22(a) requires that the defendant willfully promoted, furthered, or assisted in “*any* felonious criminal conduct by *members* of that gang.” (Italics added.) Assault and battery are felonious criminal conduct.

² Fenstermacher cites *People v. Ramirez* (2009) 172 Cal.App.4th 1018, 1024, ordered depublished July 8, 2009, S173336, which concluded the substantive crime defined in section 186.22(a) requires proof of gang-related felonious criminal conduct committed by the defendant, not merely felonious criminal conduct committed by a gang member.

Hunter was an active member of PEN1. Fenstermacher assisted Hunter in committing assault and battery as a hate crime against Sanchez and was convicted of assault. In addition, Karr testified the crime was gang related because it promoted the gang's criminal conduct by gaining notoriety for the gang and creating respect for the gang through fear.

Fenstermacher argues the crime of assault did not further PEN1's primary activities, which Karr testified are murder, attempted murder, assault with a deadly weapon, narcotics sales, and vehicle theft. Fenstermacher asserts the assault could not have enhanced the gang's notoriety or his notoriety within the gang because no gang signs were flashed, and he and Hunter did not otherwise make their gang affiliation known. According to Fenstermacher, the crime could not have been intended to intimidate local residents, because it was not committed on gang turf—indeed, PEN1 has no claimed territory.

PEN1 is a white supremacist gang. Its existence is premised on hatred. It is logical to conclude that a hate crime committed against a nonwhite person promotes PEN1's activities and is gang related. Based on Karr's testimony coupled with evidence of the nature of the crime itself, the jury could infer the crime was gang related. (See *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.)

II. *Criminal Street Gang Enhancement (§ 186.22(b))*

The jury made a true finding on the gang enhancement under section 186.22(b)(1), which provides, in relevant part: “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall . . . be punished.”

The evidence supported the jury's true finding. The evidence established Fenstermacher committed assault with the specific intent of assisting Hunter, a fellow

PEN1 gang member, in committing assault and battery as a hate crime. As we have explained, the evidence was sufficient for the jury to draw the inference Fenstermacher committed the crime for the benefit of, at the direction of, or in association with PEN1, a criminal street gang.

Relying on *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069 (*Briceno*), Fenstermacher argues the evidence did not support a true finding on the gang enhancement because the evidence did not support the inference he specifically intended the crime to promote, further, or assist PEN1's criminal gang activities. *Briceno* was a federal habeas corpus proceeding challenging the defendant's conviction in California state court on four counts each of second degree robbery and street terrorism under section 186.22(a) with sentence enhancements under section 186.22(b). (*Briceno, supra*, 555 F.3d at p. 1072.) In that case, the defendant, a member of a criminal street gang, and another member of the same gang committed four armed robberies across Orange County over several hours, yielding about \$55.50. (*Id.* at pp. 1072-1073.) At trial, the gang expert testified the crimes were committed for the benefit of, at the direction of, or in association with the gang because the crimes would glorify the gang and enhance the defendant's status within the gang. (*Id.* at p. 1074.) The expert testified his opinion would not change if the crimes were committed to buy Christmas presents. (*Ibid.*) A panel of this court affirmed. (*Id.* at p. 1075.)

In the federal habeas corpus proceeding, the defendant argued the evidence, including the gang expert's testimony, was insufficient to establish his specific intent to promote or further the gang's criminal activities and therefore did not support the enhancements under section 186.22(b). (*Briceno, supra*, 555 F.3d at p. 1078.) The Ninth Circuit Court of Appeals agreed. (*Ibid.*) Relying on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 (*Garcia*), the court concluded evidence a gang member committed a crime, without evidence linking that crime to the gang's criminal activities, was insufficient to support the inference the gang member committed that crime with the specific intent to

promote, further, or assist in the gang's criminal conduct. (*Briceno*, *supra*, 555 F.3d at p. 1079.) The court noted circumstantial evidence of specific intent, such as commission of the crime on gang turf or against rival gangs, or making gang members known to the robbery victims, was lacking. (*Id.* at p. 1081.)

California Courts of Appeal have expressed uniform disagreement with the Ninth Circuit's reasoning in *Briceno* and *Garcia*. Recently, in *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354, the court "reject[ed] the Ninth Circuit's attempt to write additional requirements into [section 186.22(b)]" and confirmed "[t]here is no statutory requirement that this 'criminal conduct by gang members' be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing."

In *People v. Hill* (2006) 142 Cal.App.4th 770, 774 (*Hill*), the Court of Appeal expressed strong disagreement with *Garcia*, *supra*, 395 F.3d 1099, stating: "*Garcia*, however, misinterprets California law. 'In *Garcia*, the Ninth Circuit found insufficient evidence of specific intent to promote, further, or assist in *other* criminal conduct by the defendant's gang. We disagree with *Garcia*'s interpretation of the California statute, and decline to follow it. [Citations.] By its plain language, the statute requires a showing of specific intent to promote, further, or assist in "*any* criminal conduct by gang members," rather than *other* criminal conduct. [Citation.].' [Citation.] . . . [¶] There is no requirement in section 186.22, subdivision (b), that the defendant's intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense the defendant commits. To the contrary, the specific intent required by the statute is 'to promote, further, or assist in *any* criminal conduct by gang members.' [Citation.] Therefore, defendant's own criminal threat qualified as the gang-related criminal activity. No further evidence on this element was necessary." (*Hill*, *supra*, 142 Cal.App.4th at p. 774.)

The Court of Appeal in *People v. Morales* (2003) 112 Cal.App.4th 1176 (*Morales*) reached the same conclusion. The court held the defendant's intent to commit robberies in association with two known gang members was sufficient to uphold sentence enhancements under section 186.22(b). (*Morales, supra*, 112 Cal.App.4th at p. 1179.) The defendant and two other gang members were convicted of robbery in a drug deal gone bad. (*Id.* at p. 1184.) At trial, the gang expert testified the robberies were committed for the benefit of, at the direction of, or in association with a criminal street gang because a gang member would commit a crime with other gang members to count on them as backup, the presence of gang members would be intimidating, and the crimes would enhance the defendant's notoriety within the gang and the gang's notoriety among rival gangs and the public. (*Id.* at p. 1197.)

On appeal, the defendant argued evidence a gang member committed a crime in association with other gang members did not in itself establish the crime was committed "(1) for the benefit of, (2) at the direction of, or (3) in *association* with a gang." (*Morales, supra*, 112 Cal.App.4th at p. 1198.) The Court of Appeal acknowledged, "it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang," but concluded the evidence permitted the reasonable inference the defendant committed the charged crimes in association with fellow gang members. (*Ibid.*)

The Court of Appeal explained that the intent element of section 186.22 (b) did not require specific intent to benefit the gang, but "'specific intent to promote, further, or assist in any criminal conduct by gang members'" (*Morales, supra*, 112 Cal.App.4th at p. 1198.) The court concluded, "defendant's intentional acts, when combined with his knowledge that those acts would assist crimes by fellow gang members, afforded sufficient evidence of the requisite specific intent." (*Id.* at pp. 1198-1199; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 20 (*Romero*) [following *Morales*].)

In *Briceno*, the Ninth Circuit expressed doubt that *Morales* “is an accurate statement of California law.” (*Briceno*, *supra*, 555 F.3d at p. 1081, fn. 4.) To the contrary, *Briceno* misinterpreted California law. *Morales*, *Hill*, *Romero*, and most recently *People v. Vazquez* accurately interpreted the language of section 186.22(b), and we follow those decisions. Here, Fenstermacher’s intentional acts, combined with his knowledge those acts would assist the crimes by fellow gang member Hunter, afforded sufficient evidence of specific intent to satisfy section 186.22(b).

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O’LEARY, ACTING P. J.

MOORE, J.